U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of OSCAR GOMEZ and U.S. POSTAL SERVICE,
MAIN POST OFFICE, El Paso, TX

Docket No. 98-744; Submitted on the Record;
Issued April 13, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits effective March 31, 1996, based on its determination that the selected position represented his wage-earning capacity; and (2) whether the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

On January 11, 1989 appellant, then a 44-year-old temporary mailhandler,[1] filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that on December 18, 1988 he injured the right side of his groin area when he pulled an approximate 1200-pound airline parcel box. The Office accepted the claim for acute right epididymal orchitis, chronic prostatitis and right testicle removal on November 6, 1989.

In a report dated July 25, 1994, Dr. Thomas C. Nicholson, a Board-certified, urologist, opined based upon a review of the medical records, employment injury history and physical examination, that appellant was capable of performing work, which required no heavy lifting. Dr. Nicholson recommended appellant receive training for a nonweight bearing job.

On March 15, 1995 the Office referred appellant for vocational rehabilitation.

By letter dated August 14, 1995, Dr. David O. Taber, appellant's treating Board-certified urologist, stated that appellant could perform any sedentary position.

In a report dated August 18, 1995, appellant's vocational rehabilitation counselor determined that appellant was capable of performing the position of cashier, which, as described in the Department of Labor's *Dictionary of Occupational Titles*, involved receiving cash or checks, counts money, issues receipts, compares totals, compiles various reports and operates office machines such as typewriter, computer and calculator. The position was sedentary in

[1] Appellant's employment was terminated on December 31, 1988 the date his temporary appointment expired.

nature and required occasional stooping. Appellant's vocational rehabilitation counselor noted six months to a year for vocational training for this position and noted that appellant had previously worked as a store clerk, sales clerk and lunch wagon driver, which exceeded the training time required for this position. It was determined by the vocational rehabilitation counselor that the position of cashier was available in sufficient numbers such that it was reasonably within appellant's commuting area by contact with a Texas State Employment Service Representative. Lastly, the vocational rehabilitation counselor noted that the wages of the position was $180.00 to $220.00 per week.

On February 23, 1996 the Office provided appellant with a notice of proposed education of compensation, based on his ability to perform the duties of a cashier. The Office advised appellant that if he disagreed with the proposed action, he could submit additional factual or medical evidence relevant to his capacity to earn wages.

By decision dated March 29, 1996, the Office finalized its reduction of appellant's compensation effective March 31, 1996.

Appellant requested an oral hearing by letter dated April 8, 1996 and a hearing was held on February 6, 1997.

In a February 10, 1997 letter, Dr. Taber noted that appellant continued to have problems with his chronic prostatitis, which seemed to be aggravated by prolonged sitting of five hours or more. Dr. Taber opined appellant was capable of performing a sedentary position provided he was able to get up and walk around periodically.

In a decision dated April 18, 1997, the hearing representative found that the position of cashier fairly represented appellant's wage-earning capacity and affirmed the March 29, 1996 Office decision. Thus, the hearing representative affirmed the reduction of appellant's compensation.

In a letter dated June 23 1997, appellant requested reconsideration of the April 18, 1997 decision and requested that he be given retraining for a nonweight position as recommended by Dr. Nicholson.

By nonmerit decision dated October 7, 1997, the Office denied appellant's request for modification as he failed to submit any relevant evidence nor raised any substantive legal question.

The Board finds that the Office properly reduced appellant's compensation benefits effective March 31, 1996 based on its determination that the selected position represented his wage-earning capacity.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.[2] After it has determined that an employee has disability

[2] *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[3] As used in the Federal Employees' Compensation Act, the term disability means incapacity because of an employment injury to earn the wages the employee was receiving at the time of injury; that is, a physical impairment resulting in a loss of wage-earning capacity.[4] The Office met its burden by establishing that appellant had no loss of wage-earning capacity and, therefore, was not disabled within the meaning of the Act after March 31, 1996.

The Office then properly followed established procedures for determining appellant's employment-related loss of wage-earning capacity.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[5]

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.[6] Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.[7]

Through contact with the vocational counselor, the Office determined that the constructed position of cashier reasonably represented appellant's wage-earning capacity. The vocational counselor identified the cashier position listed in the Department of Labor's *Dictionary of Occupational Titles* and provided the required information concerning the position descriptions, the availability of the positions within appellant's commuting area and pay ranges within the geographical area. It was determined by the vocational rehabilitation counselor that this position was in accord with appellant's background, education and experience and reasonably available within his geographical area in August 1995 and found that it was appropriate for appellant based on Dr. Taber's opinion that appellant could perform a sedentary job. Based on these restrictions and on the vocational counselor's recommendations, the Office selected the position of cashier, which it found suitable for appellant. The Office noted that the position described was light or sedentary, which was consistent with the recommendations of both Dr. Taber, appellant's treating physician and Dr. Nicholson, the Office second opinion physician and used the information provided by the rehabilitation counselor regarding the

[3] *Id.*

[4] *Ralph W. Baker*, 39 ECAB 1413 (1988).

[5] *Carol Letcher*, 46 ECAB 452 (1995).

[6] *Samuel J. Chavez*, 44 ECAB 431 (1993); *Hattie Drummond*, 39 ECAB 904 (1988); *see* 5 U.S.C. § 8115(a); A. Larson, *The Law of Workers' Compensation* § 57.22 (1989).

[7] *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

prevailing wage rate in the area of a cashier to ascertain the wages of the position. Therefore, the Office properly based appellant's wage-earning capacity on the selected position of cashier and reduced compensation benefits effective March 31, 1996.

The Board further finds that the Office properly denied appellant's request for reconsideration under section 8128.

The Office has issued regulations regarding its review of decisions under section 8128(a) of the Act. Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by written request to the Office identifying the decision and the specific issue(s) within the decision, which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

> "(i) Showing that the Office erroneously applied or interpreted a point of law, or
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> "(ii) Advancing a point of law or fact not previously considered by the Office, or
>
> "(iii) Submitting relevant and pertinent evidence not previously considered by the Office."[8]

Section 10.138(b)(2) provides that any application for review of the merits of the claim, which does not meet at least one of the requirements, listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[9] Evidence that repeats or duplicates evidence already in the case record has no evidentiary values and does not constitute a basis for reopening a case.[10] Evidence that does not address the particular issue involved, also does not constitute a basis for reopening a case.[11]

Appellant did not submit any new evidence in support of his request for reconsideration nor did he advance a point of law not previously considered by the Office or that the Office had erroneously applied the law. As appellant failed to submit any new evidence or argument regarding error on the part of the Office, the Office properly denied merit review of the previous decision.

[8] 20 C.F.R. § 10.138(b)(1).

[9] *See* 20 C.F.R. § 10.138(b)(2).

[10] *Daniel Deparini*, 44 ECAB 657 (1993).

[11] *Id.*

The decisions of the Office of Workers' Compensation Programs dated October 7 and April 18, 1997 are hereby affirmed.

Dated, Washington, D.C.
April 13, 2000

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member